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IN THE SUPREME COURT OF THE
STATE OF UTAH

----- : -----
STATE OF UTAH, :

Plaintiff-Respondent, :

-vs- :

Case No.
14586

WILLIAM L. FORSYTH, :

Defendant-Appellant. :
----- : -----

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT, SENTENCE AND
DENIAL OF MOTION TO WITHDRAW PLEA AS
ENTERED BY THE FOURTH JUDICIAL DISTRICT
COURT, IN AND FOR UTAH COUNTY, STATE OF
UTAH, THE HONORABLE J. ROBERT BULLOCK,
JUDGE, PRESIDING

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FILED

SEP 27 1976

Clk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE
STATE OF UTAH

----- : -----
STATE OF UTAH, :
Plaintiff-Respondent, :
-vs- : Case No.
WILLIAM L. FORSYTH, : 14586
Defendant-Appellant. :
----- : -----

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

The appellant, William L. Forsyth, appeals from an order denying his motion to withdraw his guilty plea and judgment and sentence entered thereon in the Fourth Judicial District Court, Utah County, State of Utah, the Honorable J. Robert Bullock, presiding.

DISPOSITION IN THE LOWER COURT

Appellant's motion to withdraw his guilty plea

was denied by the court on March 14, 1978.

and appellant was sentenced for an indeterminate term in the Utah State Prison, with execution of the sentence stayed pending appeal.

RELIEF SOUGHT ON APPEAL

Respondent requests that the order denying appellant's motion to withdraw his guilty plea be affirmed.

STATEMENT OF THE FACTS

Respondent substantially agrees with appellant's Statement of Facts, but makes the following deletions, additions and corrections:

1. On August 11 and 12, 1975, after the preliminary hearing, appellant and his original counsel discussed the matters involved, the importance of the preparation, and counsel's fee requirements (Tr.50). Appellant stated that he had to see some friends and relatives to arrange for the fee and get back to his counsel (Tr.51). Between the arraignment on September 12, 1975, and the trial date on January 5, 1976, however, appellant contacted his counsel only once and had failed to make the necessary arrangements. Appellant's counsel had tried many times but failed to contact appellant (Tr.51-54).

2. During appellant's colloquy with the court concerning the voluntariness of his guilty plea, he stated that he had not been threatened by anyone except the pursuit of other charges against him if he did not plead guilty (Tr. 73).

3. Appellant made no complaints about his attorney up to the time of his guilty plea.

4. The prosecutor denied that any of his statements during the plea bargaining process were not in compliance with the A.B.A. Canons of Ethics and claimed that appellant's motives in pleading guilty, attempting to withdraw the plea, not cooperating with counsel, and not cooperating with Adult Probation and Parole were merely to manipulate the entire judicial process (Tr.100).

5. The probable cause standard enunciated by the court was in reference to the sufficiency of appellant's alleged defense during the hearing on the motion to withdraw and not in reference to sufficiency of the State's evidence (Tr.117).

ARGUMENT

POINT I

APPELLANT'S GUILTY PLEA WAS MADE VOLUNTARILY AND FREE FROM COERCION BECAUSE ANY STATEMENTS MADE BY THE PROSECUTION DID NOT OVERCOME THE WILL OF THE APPELLANT TO RATIONALLY WEIGH THE CHOICES BEFORE HIM.

In determining the voluntariness of a guilty plea, the United States Supreme Court, in an article contained in 25 L.Ed.2d 1025, 1029-30 (1971), enumerated a number of factors which can be taken into consideration, among them whether the plea was induced by some form of coercion, such as threats or intimidation. Appellant alleges that his guilty plea was coerced as a result of threats by the prosecution and his own counsel and by his counsel's conduct with respect to financial matters. Even if such threats were in fact made, it does not necessarily follow that the guilty plea was coerced. To be entitled to relief, appellant must show (1) that the threats were made; (2) that such threats did in fact influence him; and (3) that the influence was such that it amounted to coercion. Gardner v. State, 537 P.2d 467 (Nev. 1975).

In determining whether or not appellant was in fact coerced, the court may consider all of the evidence including the record taken at the time the appellant entered his plea of guilty. Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970).

The fact that any threats were ever made by the prosecution to the appellant was strongly contested by the prosecution with the following:

"There is no time when the defendant has been--when I have had direct contact with the defendant. I have made comments with regard to plea bargaining in the matter with defendant's counsel in his law office. At this time the defendant was not present. I made statements to the defendant's attorney in the hall probably less than a minute, in discussing some of the pros and cons of him pleading. At no time were any of these discussions not in compliance with the A.B.A. Canons of Ethics with regard to plea bargaining in criminal matters. It is my opinion, your Honor, that the defendant has attempted to manipulate his own counsel in this case, he's attempted to manipulate the Federal Court to get involved in the State in this case at this time, he's attempted to manipulate the Adult Probation and Parole, and he's attempted to manipulate this court with regard to the entire proceedings." (Tr.100).

The test for determining whether or not these statements, if any, did sufficiently influence the appellant in his decision to plead guilty, was outlined in Strong v. Turner, 22 Utah 2d 294, 452 P.2d 323, 324 (1969), where this Court stated:

"But the mere fact that a defendant, against whom there are multiple charges pending, pleads guilty to one of them on the condition that the others be dropped certainly does not in and of itself compel a finding of coercion. There is nothing in this regard to justify a conclusion that the will of the plaintiff (sic "defendant") was overcome, or that he did not rationally weigh the choices before him and choose the one which he then thought was most beneficial to his interest."

In accordance with the great volume of caselaw in this area, Strong indicates that in determining the voluntariness of a guilty plea, courts of necessity must focus on the question of what factor or factors motivated a defendant to plead guilty in a particular case. If, for example, the guilty plea was the considered choice of the accused, free of coercion, promises or any other factor or inducement which overcame the will of the accused, and was a free and rational conclusion based upon the various alternatives open to him, the plea is said to be voluntary. This is true

regardless of the defendant's guilt of the specific crime in question. If, on the other hand, the accused pleaded guilty because of some influence not properly to be considered as a factor in his decision, then the plea is said not to be voluntary. See, e.g., United States ex rel. Brown v. LuVallee, 301 F.Supp. 1245, 1253 (S.D.N.Y. 1969).

The Court in Brady, supra, also emphasized that possible innocence of the defendant and certain encouragements and motivations by the prosecution are not solely determinative of the coercion question. It was said there:

"The State to some degree encourages pleas of guilty at every important step in the criminal process. For some people their breach of a State's law is alone sufficient reason for surrendering themselves and accepting punishment. For others, apprehension and charge, both threatening acts by the Government, jar them into admitting their guilt. In still other cases the post-indictment accumulation of evidence may convince the defendant and his counsel that a trial is not worth the agony and expense to the defendant and his family. All these pleas of guilty are valid in spite of the State's responsibility for some of the factors motivating the pleas; the pleas are no more improperly compelled than is the decision by a defendant at the close of the State's evidence at trial that he must take the risk of a certain conviction." 397 U.S. at 340, 81 S.Ct. at 1170.

Respondent contends that the detailed transcript of the inquiry by the trial court into the voluntariness of the guilty plea clearly established no coercion sufficient to overcome the free will of the appellant (Tr.69-74). Appellant specifically stated that he had not been threatened with anything other than the pursuit of charges agreed to be dropped in accordance with the plea bargain (Tr.73). In addition, contrary to his assertion that he anticipated probation, appellant stated he had not been promised anything and was told to dismiss any promise from his consideration (Tr.70,72,73,97). Moreover, not only is appellant's belief as to his innocence not conclusive as to involuntariness, as stated above, but appellant stated, after conferring with his counsel, that he pleaded guilty because he was guilty (Tr.72). Finally, any possible adverse financial considerations could validly form the basis of a guilty plea under Brady, supra. For these reasons, it is clear that appellant was not coerced or threatened beyond that of the realities for any defendant in any case. He rationally weighed the choices before him and in light of the evidence, would have undoubtedly plead guilty even without the benefit of the prosecutor's statements or adverse financial circumstances.

POINT II

THE TRIAL COURT CORRECTLY USED A PROBABLE CAUSE STANDARD IN DETERMINING FACTUAL BASIS FOR THE GUILTY PLEA BECAUSE A DETERMINATION OF GUILT BEYOND A REASONABLE DOUBT OR EVEN BY THE PREPONDERANCE OF THE EVIDENCE IS UNNECESSARY.

Prior to a complete summary of evidence by the prosecution with respect to appellant's guilt, the court considered the question of whether appellant had a meritorious defense to the prosecution's claims. At this time the court stated that it was using a probable cause standard rather than beyond a reasonable doubt (Tr.117). The court noted that it was not necessary to establish the defense beyond a reasonable doubt since that standard is normally left to the jury during a trial. The question as to the standard was raised by the prosecution and not the defense. Whether the court used a probable cause standard in determining factual basis of all the evidence is unknown. Although many cases are presented with the issue of whether there is a sufficient factual basis for the guilty plea, most courts fail to

... .. in addition to the

statutory standard already in existence. In Utah, it appears that no statutory standard or procedural rule requires factual basis. The United States Supreme Court does require that a guilty plea be based upon some factual basis. Nevertheless, all courts are in agreement with the trial court in the present case that evidence beyond a reasonable doubt is unnecessary. In People v. Hobbs, 242 N.W.2d 511 (Mich. App. 1976), where the appellant contended that his plea-based conviction for assault with intent to rob was not grounded upon adequate factual basis, the court held that the rule requires only substantial support for the appellant's guilt, not conclusive proof of the crime charged. In addition, in People v. Meyer, 26 111.255, 35 221, 311 N.E.2d 192, 193 (1973) where appellant contended there was no sufficient factual basis for his plea to the crime of burglary, the court held:

The requirement of a factual basis for the guilty plea is met where it appears from the record that there is a basis for reasonably concluding that the defendant committed the crime he was charged with, including any requested instruction. It does not have to be a basis for concluding that the defendant committed the crime beyond a reasonable doubt, but it must be a basis for concluding that the defendant committed the crime.

Appellant contends that because his guilty plea was coupled with assertions of innocence the trial court should have used a higher standard for the determination of factual basis of the plea. It should be noted, however, that at the time appellant pleaded guilty he made no assertions of innocence. In fact, appellant specifically stated that he was pleading guilty because he was guilty (Tr.72). It was only at the time of withdrawal of the plea that appellant contended innocence. Respondent contends that once the trial court has satisfied itself that there is a factual basis for the guilty plea and it is voluntarily and intelligently made, the court need not reiterate all of the evidence against the accused upon the record a second time. This also emphasizes that the trial court used a probable cause standard only in relation to appellant's alleged defense. Clearly, the court was correct in not using a standard of proof beyond a reasonable doubt in determining factual basis for the original plea or for appellant's defense. Regardless of the exact standard used it is evident under Point III that there was a factual basis for withdrawal.

POINT III

THE TRIAL COURT CORRECTLY DETERMINED THERE WAS SUFFICIENT EVIDENCE TO ESTABLISH A FACTUAL BASIS FOR APPELLANT'S GUILTY PLEA.

It is a well-settled rule that the trial court is not required to specifically require of the defendant as to the factual basis for a plea of guilty. Inquiring of the county attorney, examination of the presentence report, minutes of testimony, conversations with both sides during a plea negotiation conference, or from any other part of the record, if before the court, are alternative methods. State v. Painter, 195 Neb. 183, 237 N.W.2d 142 (1976); People v. Emery, 30 Ill.App. 3d 466, 344 N.E.2d 43 (1976); State v. Huizar, 112 Ariz. 489, 543 P.2d 1116 (1975); People v. Robinson, 28 Ill. App. 3d 757, 329 N.E.2d 317 (1975).

From the record it is clear that the trial court satisfied itself there was a factual basis for the guilty plea. At the time of the plea appellant specifically stated that he pleaded guilty because he was guilty (tr.72). In addition, Count I of the Information was read to appellant and he indicated he understood the certain regarding the offense to which he was to plead (Tr.69). By the time of the decision on appellant's

motion to withdraw the plea the presentence report had not been filed (Tr.154). During the hearing on appellant's motion to withdraw the plea the court listened to fourteen transcript pages of evidence presented by the prosecution as to what evidence it intended to introduce into trial (Tr.126-139). This is in addition to the fact that the appellant had appeared before the trial court at least eight times upon different motions and circumstances and was thus well aware of the factual basis behind the plea.

Appellant contends that the trial court failed to find a sufficient factual basis to support appellant's intent to commit the crime, as required by Utah Code Ann. § 76-6-405(i) (Supp. 1975). The prosecution detailed the scheme of appellant and explained several times how intent could be shown from the deception (Tr. 126-128, 131, 136). As stated under Point II above, it was unnecessary for the trial court to resolve all questions beyond a reasonable doubt. In Interest of Higgins, 348 N.E.2d 292, 295 (Ill. App. 1976), where defendant's guilty plea to the crime of battery was accepted over the possible defense of self-defense, the court stated:

"The requirement that the trial court be satisfied there is a factual basis for the plea before accepting a guilty plea does not compel the court to resolve all contradictory evidence in the case. The court need not be convinced beyond a reasonable doubt there is a factual basis for each element of the offense charged."

For these reasons, respondent contends the trial court correctly determined there was sufficient evidence to form a factual basis for appellant's guilty plea.

POINT IV

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT THE APPELLANT DID NOT PRESENT A PLAUSIBLE BASIS FOR WITHDRAWING HIS GUILTY PLEA.

It is also a well settled standard in the State of Utah that the granting or refusing to permit the withdrawal of a guilty plea is a matter which lies in the sound discretion of the trial judge. Henline v. Smith, 548 P.2d 1271 (1976); State v. Plum, 14 Utah 2d 124, 378 P.2d 671 (1963); Stinson v. Turner, 473 F.2d 913 (10th Cir. 1973); State v. Lee Lim, 79 Utah 68, 7 P.2d 825 (1932). This is in accordance with the Utah Code of Criminal Procedure in Utah Code Ann. § 77-11-3 (1953), which states:

"The court may at any time before judgment, upon a plea of guilty, permit it to be withdrawn and a plea of not guilty substituted."

Under Point I above, it was shown that appellant's guilty plea was not coerced because he was able to make a free and rational decision between the available alternatives. Any statements by the prosecution or appellant's original counsel were not sufficient to overcome the will of the appellant. Thus, any alleged coercive statements cannot be considered as factors in determining the withdrawal of the guilty plea.

Appellant alleges three factors which the court failed to consider in its decision to deny appellant's motion to withdraw: no prejudice to the State; this was a pre-sentence motion; and appellant's innocence. Respondent admits that post-sentence motions to withdraw may be somewhat less reliable, but contends that simply because the motion was made prior to sentencing does not call for a wholesale abandonment of guilty pleas. In the present case, it should be remembered that appellant agreed to plead guilty pursuant to a plea bargaining process, upon the advice of competent counsel, voluntarily and understandingly, during an extended dialogue with the court. This is not a case where the appellant was intoxicated, spoke a foreign language, or was not given

the promised bargain by the prosecution. The prosecution kept its part of the bargain by dismissing a series of counts of the information pursuant to the agreement. In Stinson, supra, the court held that where the appellant had made a recent and clear statement before the sentencing judge that he understood the charge and the maximum punishment and the judge was advised of the plea bargain, the refusal to permit the plea to be withdrawn was not an abuse of discretion by the State trial court.

Other cases have reached similar results. In State v. Huntley, 129 N.J. Super. 13, 322 A.2d 177, 179 (1974), where appellant desired to withdraw his guilty pleas to robbery and sodomy prior to sentencing, the court held:

"We have canvassed the entire record and agree with the trial judge that the guilty pleas were voluntarily and knowingly entered, and that the trial judge did not abuse his discretion in refusing to permit withdrawal of the pleas. . . Defendant's bare assertions that he mistakenly entered his guilty pleas, and that he was improperly coerced to do so, are unsupported in the record. His late protestations of innocence, and the victim's certification of defendant's innocence on the sodomy charge were found to be unworthy of belief, and were properly rejected by the trial judge. . . The figure of justice is blindfolded but is not blind to those who seek to make a mockery of justice. . .

". . . when a voluntary and knowing plea bargain has been entered into simultaneously with the guilty plea, defendant's burden of presenting a plausible basis for his request to withdraw his guilty plea is heavier. The approved philosophy of 'plea bargaining' is dependent upon the good faith of both sides in carrying out the bargain when it is voluntarily and knowingly made, is fair and just and is ultimately approved by the trial judge. A whimsical change of mind by defendant, or the prosecutor, will not be a valid reason for altering the bargain . . . Even a belated assertion of innocence will not upset an otherwise validly entered into plea bargain." North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). (Emphasis added.)

In State v. Ellison, 111 Ariz. 167, 526 P.2d 706, 707 (1974), the Court said:

"It is not sufficient to show that the defendant merely changed his mind if he was advised by counsel throughout the proceedings, understood the proceedings to the best of his ability, and was under no coercion or misapprehension concerning the consequences of his guilty plea. . . In fact, a defense attorney may be performing his best service for his client in advising him to plead guilty as a means of bargaining for the most lenient treatment possible."

For these reasons it is clear that merely because the appellant made his belated protestations of innocence prior to sentencing, . . .

court specifically determined appellant's motives of manipulating the system and correctly used its discretion to deny appellant's motion.

POINT V

APPELLANT RECEIVED ADEQUATE ASSISTANCE OF COMPETENT COUNSEL BECAUSE HIS ATTORNEY WAS A COMPETENT MEMBER OF THE BAR WHO SHOWED A WILLINGNESS TO IDENTIFY HIMSELF WITH AND REPRESENT THE INTERESTS OF APPELLANT IN GOOD FAITH.

The right to effective or adequate assistance of counsel was first enunciated by the United States Supreme Court in Powell v. Alabama, 287 U.S. 45, 72 L.Ed. 158, 53 S.Ct. 55 (1932), which held that failure to make an effective appointment of counsel violates the Sixth Amendment right to counsel and is a denial of due process under the Fourteenth Amendment.

Later cases have held that adequate assistance of counsel depends on whether the advice to plead guilty was within the range of competence demanded of attorneys in criminal cases. McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); Tollett v. Henderson, 411 U.S. 258, 93 S.Ct. 1662, 36 L.Ed.2d 343 (1973).

Beyond the general tests hinted in Tollett and McMann, however, the Supreme Court has relegated to state and lower courts the task of defining more specifically the standard of adequate representation by counsel.

In Strong v. Turner, supra, this Court outlined the test of competence of court appointed counsel in pre-trial proceedings with respect to a guilty plea as follows:

"No one will question that the right of an accused to counsel means by a competent member of the Bar who shows a willingness to identify himself with and represent the interests of the defendant in good faith."
452 P.2d at 324.

The court held that the mere fact that counsel held relatively brief conferences with the accused prior to entry of the guilty plea did not establish that the accused was denied effective representation by counsel. Other Utah cases also suggest that the Court look to the record for suggestions of "bad faith conduct on the part of the attorney." Washington v. Turner, 17 Utah 2d 361, 412 P.2d 449 (1966). This concept of "bad faith" was defined in Alires v. Turner, 22 Utah 2d 118, 121, 449 P.2d 241, 243 (1969), as follows:

"The [due process] requirement [of counsel] is not satisfied by a sham or pretense of an appearance in the record by an attorney who manifests no real concern about the interests of the accused." (Emphasis added.)

Appellant does not contend that his original counsel was incompetent. He maintains, however, that counsel's representation with respect to fees and probation constituted ineffective assistance of counsel. Respondent contends that the record clearly shows appellant had not only adequate but effective assistance of competent counsel.

It should be noted preliminarily that appellant's counsel in the present case was privately retained rather than court assigned. This Court in Strong, supra, observed that counsel was court-appointed and many other courts make a similar distinction. See, e.g., Loftis v. Esteale, 515 F.2d 872 (5th Cir. 1975); Davis v. Slayton, 353 F.Supp. 571 (Va. 1973); "Modern Status of Rule as to Test in Federal Court of Effective Representation by Counsel," 26 A.L.R. Fed. 218, 238 (1976). Although such a distinction is not determinative of appellant's claims, it is important in that appellant was represented by counsel of his own choosing.

Other facts support the contention that appellant was adequately represented. On January 5, 1976, the court entertained defense counsel's motion for continuance. Grounds for the continuance were stated by appellant's counsel as follows:

"A preliminary hearing was held August 11th and 12th I believe, Your Honor. At that time I discussed with my client the matters involved, the importance of the preparation and my fee requirements. My client stated that he would attend to these matters. We came to--or I came to Provo, defendant lives in Orem, he was arraigned and trial was set in this matter for January 5, 1976. And that was on the 12th day of September, 1975. Thereafter, Your Honor, my client informed me that he had several small business matters to attend to, that he had to see some of his friends and relatives to arrange for the fee, and that he would be back in contact with me shortly to make his records available to me and to review the situation. I did not again hear from my client until December 2, 1975. In the meantime I had written several letters to his residence, which he did not receive because he was not there and apparently not in contact with them. My client agreed to be in on the 10th. He did not come in. He called my office on Saturday the 12th or 13th and said that he would--spoke to my secretary, said that he would be in the following week. He did not come in. I finally reached him by telephone, and he came to my office on Monday following Christmas, that would have been December 15th. He said he had one small business matter to attend to and would be back that evening or the following day." (Tr.50-51)

"The [due process] requirement [of counsel] is not satisfied by a sham or pretense of an appearance in the record by an attorney who manifests no real concern about the interests of the accused." (Emphasis added.)

Appellant does not contend that his original counsel was incompetent. He maintains, however, that counsel's representation with respect to fees and probation constituted ineffective assistance of counsel. Respondent contends that the record clearly shows appellant had not only adequate but effective assistance of competent counsel.

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Other facts support the contention that appellant was adequately represented. On January 5, 1976, the court entertained defense counsel's motion for continuance. Grounds for the continuance were stated by appellant's counsel as follows:

"A preliminary hearing was held August 11th and 12th I believe, Your Honor. At that time I discussed with my client the matters involved, the importance of the preparation and my fee requirements. My client stated that he would attend to these matters. We came to--or I came to Provo, defendant lives in Orem, he was arraigned and trial was set in this matter for January 5, 1976. And that was on the 12th day of September, 1975. Thereafter, Your Honor, my client informed me that he had several small business matters to attend to, that he had to see some of his friends and relatives to arrange for the fee, and that he would be back in contact with me shortly to make his records available to me and to review the situation. I did not again hear from my client until December 2, 1975. In the meantime I had written several letters to his residence, which he did not receive because he was not there and apparently not in contact with them. My client agreed to be in on the 10th. He did not come in. He called my office on Saturday the 12th or 13th and said that he would--spoke to my secretary, said that he would be in the following week. He did not come in. I finally reached him by telephone, and he came to my office on Monday following Christmas, that would have been the 15th or 16th, and he said he had small business matters to attend to and would be back that evening or the following day." (Tr.50-51)

Appellant's counsel also showed his willingness to represent appellant after the hearing when he entered into plea negotiations at the request of the prosecution (Tr.20-21). Moreover, appellant's counsel continued to be interested and participate in the case even when appellant hired another attorney. At no time prior to or during the entry of the guilty plea did appellant express his dissatisfaction with his counsel. And, as stated in Brady, supra, financial circumstances can justifiably form the basis of a guilty plea. For these reasons, respondent contends that appellant was adequately represented by counsel and any fears he acquired were unjustified and unreasonable in light of his attorney's good faith effort to advise him of the most beneficial course of conduct.

CONCLUSION

Because appellant was not coerced into entering his guilty plea, his plea was supported by adequate factual basis according to the correct standard of the trial court, his motion to withdraw the plea was discretionary with the trial court and he was effectively represented by counsel, respondent respectfully requests that this Court dismiss

appellant's appeal and affirm the judgment and sentence
of the trial court rendered below.

Respectfully submitted,

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